UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MANHATTAN BEER DISTRIBUTORS LLC, Petitioner/Cross-Respondent, - against - NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner.	NOS. 15-2845, 15-3099

MANHATTAN BEER DISTRIBUTORS LLC'S OPPOSITION TO THE NATIONAL LABOR RELATIONS BOARD'S MOTION FOR PUBLICATION OF THE SUMMARY ORDER

Manhattan Beer Distributors LLC ("Manhattan Beer") submits this opposition to the National Labor Relations Board's ("Board") Motion for Publication of the Summary Order ("Motion") issued on November 16, 2016 by a unanimous panel of this Court (Chief Judge Katzmann and Circuit Judges Wesley and Carney) (the "Summary Order").

1. The Board's Motion should be denied because this Court correctly determined in issuing a summary order that publication of the disposition of this appeal is not in the public interest and should not have precedential value. *See* 2d Cir. IOP 32.1.1(a) ("When a decision in a case is unanimous and each panel judge believes that no jurisdictional purpose is served by an opinion (i.e., a ruling having precedential effect), the panel may rule by summary order.").

2. The Board's Motion relies exclusively on cases about the decision to publish opinions decided by this Court prior to January 1, 2007, when Fed. R. App. P. 32.1 changed the rules concerning citation of opinions designated as "not for publication," such as the summary order here. In the period from 1973 through 2006, this Court enforced Local Rule 0.23, which stated that summary orders "do not constitute formal opinions of the court and are unreported and not uniformly available to all parties," and, accordingly, "they shall not be cited or otherwise used in unrelated cases before this or any other court." *See Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 370 n.11 (2d Cir. 2003). The adoption of that rule responded to a request by the Judicial Conference "to reduce the unnecessary proliferation of published opinions." *Furman v. United States*, 720 F.2d 263, 265 (2d Cir. 1983); *see* Hon. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177, 184 (1999).

3. Because the former, pre-Fed. R. App. P. 32.1 local rule contained a complete prohibition on citation of unpublished dispositions, this Court looked to the parties, including agencies such as the Board, to call to its attention circumstances when that heavy bar should be lifted. In 2007, however, this Court adopted 2d Cir. R. 32.1.1, which expressly authorizes the citation of any summary order issued on or after January 1, 2007. The Summary Order and the underlying Board Decision and Order are readily available and can be easily read by the

public and cited, consistent with 2d Cir. R. 32.1.1, by future litigants, including the Board. *See Manhattan Beer Distribs. LLC v. NLRB*, 2016 U.S. App. LEXIS 20520 (2d Cir. Nov. 16, 2016); *https://www.nlrb.gov/case/29-CA-115694*.

4. This Court also has adopted an IOP to guide panels in deciding whether to classify a disposition as one by summary order or by published opinion. The panel here has already properly, and correctly, weighed the public interest and potential precedential value of the Summary Order.

5. The post-2006 approach is reflected in a recent motion decision in *Three D, LLC d/b/a Triple Play Sports Bar and Grille*, a case also involving a Board request to publish a summary order. This Court summarily rejected arguments and briefing substantially similar to those currently being asserted by the Board in this case. *See* Motion for Publication of Summary Order (Doc. 108), *Three D, LLC v. NLRB*, Dkt. No. 14-3284(L) (2d Cir. Oct. 23, 2015), *denied by*, Order Denying Motion for Publication (Doc. 114), *Three D, LLC v. NLRB*, Dkt. No. 14-3284(L) (2d Cir. Oct. 27, 2015) (unpublished) (copies attached).

6. The Summary Order here deals tersely with the issues raised by the appeal. This, of course, is a common feature of unpublished dispositions in this Circuit. *See, e.g., Vincent's of Mott Street, Inc. v. Quadami, Inc.*, 423 Fed. Appx. 46, 48 (2d Cir. 2011) ("Because we write for the parties, who are familiar with the facts and procedural history, we recount only those facts necessary for our

decision."). A panel will use this device to expedite disposition of an appeal which may be decided without modifying or expanding existing law. Of course, "[t]he fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal," *Furman*, 720 F.2d at 265, but the summary order process will result, as here, in a briefer opinion, directed to informing the parties (who already know the case well) of the reasons for the Court's decision. It may not provide the nuance and detail that the Court would choose to add if it had planned to publish the opinion and declare it to have precedential effect.

7. In contrast, a published, precedential opinion demands much more laborious preparation. A published decision in this Circuit binds subsequent panels until and unless an en banc court or the Supreme Court reverses it. *See, e.g.*, *United States v. Snow*, 462 F.3d 55, 65 n.11 (2d Cir. 2006). As the Ninth Circuit has observed:

> In writing an opinion, the court must be careful to recite all facts that are relevant to its ruling, while omitting facts that it considers irrelevant. Omitting relevant facts will make the ruling unintelligible to those not already familiar with the case; including inconsequential facts can provide a spurious basis for distinguishing the case in the future. The rule of decision cannot simply be announced, it must be selected after due consideration of the relevant legal and policy considerations. Where more than one rule could be followed — which is often the

> case — the court must explain why it is selecting one and rejecting the others. Moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases. Modern opinions generally call for the most precise drafting and re-drafting to ensure that the rule announced sweeps neither too broadly nor too narrowly, and that it does not collide with other binding precedent that bears on the issue. *See* Fred A. Bernstein, *How to Write it Right*, Cal. Lawyer, at 42 (June 2000). Writing a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants. When properly done, it is an exacting and extremely time-consuming task.

Hart v. Massanari, 266 F.3d 1155, 1176-77 (9th Cir. 2001).

8. Indeed, the cases cited by the Board in its Motion note that the various panels frequently revised their prior summary orders before publishing them. The process of moving from unpublished to published disposition, then, imposes a significant burden on this Court which must be grounded in a solid justification.

9. No such justification lies here. The Summary Order merely enforced the Board's fact-specific Decision and Order in *Manhattan Beer Distributors LLC*, 362 NLRB No. 192 (Aug. 27, 2015), observing that "the Board reasonably construed the NLRA, in light of relevant judicial and administrative precedent, in determining that Diaz had the right to the physical presence of a union

representative before consenting to take a drug test in the context of an investigation that he reasonably believed would result in discipline. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260, 262 (1975)."[1] Summary Order at 3.

10. Contrary to the Board's assertion that this case "contains important analysis of the Board's remedial authority" (Motion at paragraph 3, page 3), the Summary Order did not establish any new or novel legal precedent or engage in any meaningful development of existing law. Rather, the panel upheld the Board's "make whole" remedial order based upon a "sufficient nexus between the unfair labor practice committed" and the finding of fact-specific documentation that Diaz was terminated for assertion of his *Weingarten* rights "because he '[r]efused to go for drug testing under the reasonable suspicion of substance abuse.'" *See Taracorp Inc.*, 273 NLRB 221, 223 n. 12 (1984) ("A make-whole remedy can be appropriate in a *Weingarten* setting if, but only if, an employee is discharged or disciplined for asserting the right to representation."); *Ralphs Grocery Co.*, 361 NLRB No. 9 (2014). Summary Order at 3.

11. The disposition of this appeal, then, turned on the specific factual application of well-established legal principles. No significant contribution would

[1] While the Summary Order addresses only employee rights to union representation *before* consenting to a drug test, the Board's Motion mischaracterizes the Court's limited holding as supporting the entirely different rationale, not addressed by the Court, "regarding the contours of employee representation *during* drug tests." Motion at 3 (emphasis added). Perhaps this explains why the Board advocates publication of the Summary Order. If so, the Board's explanation further confirms why publication of the Summary Order is not appropriate; there would be a substantial risk of future misuse of the opinion as proposed precedent.

be made by publishing that analysis. As Judge Boyce Martin of the Sixth Circuit has noted, "The premise that a precedent needs to be buttressed with cites to various minor cases is faulty.… Good precedent is good precedent. One does not need to pile on the excess verbiage of string cites to random, minor cases. … [There is] no need for more published opinions in order to flesh out unneeded string cites." Martin, *supra*, 60 OHIO ST. L.J. at 193.

WHEREFORE, Manhattan Beer respectfully requests that the Court deny the Board's Motion for Publication of the Summary Order issued in this case.

Dated: New York, New York
December 22, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2016, I electronically filed the foregoing response to the National Labor Relations Board's Motion for Publication of the Summary Order with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

Dated: New York, New York
December 22, 2016

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